

# Transfer of Development Rights

Evaluating the Options for  
The City of Concord, NH



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Revised DRAFT April 26, 2008



## Introduction

The City of Concord is at a very important crossroads in its land use future that will determine whether major portions of the rural landscape are kept intact for future generations or divided up for development. Parallel to this discussion is whether new residential development will meet smart growth principles through more compact development patterns - much like the city's traditional neighborhoods - or be more like recent, lower density suburban developments. As part of the new master plan process, strong public support was received for the concept of preserving rural parts of the community and permitting the development density that would have occurred there to be located in and adjacent to existing neighborhoods.

The concept of lowering development density in one area and increasing it elsewhere in a community is not new. For more than forty years communities in the United States have been utilizing a tool, known as Transfer of Development Rights (or TDR), to provide a legal mechanism to shift new development away from one area and into another. The purpose of this report is to summarize the legal basis, key issues and experience of using TDR to achieve local planning objectives and offer recommendations for how it can be applied in Concord, New Hampshire<sup>1</sup>.

## Transfer of Development Rights Defined

In its basic form, TDR provides a zoning mechanism to create "sending" and "receiving" zones in a community. Development capacity from a sending zone property is transferred to a receiving zone. The sending zone property is then protected from additional development through the direct donation of land or conservation easement, usually to the municipality or a conservation organization. A developer in a receiving zone can then acquire approval to add additional housing units that relate to the reduced number of units being transferred from the sending zone. The density transfer can either be on a unit for unit basis or some other ratio as determined by the municipality. Most TDR programs have sought to protect open space and environmentally sensitive land but larger cities have also used it for a variety of other public objectives including the protection of historic landmarks or performing arts

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<sup>1</sup> This report builds on several memoranda to the Concord Planning Board, prepared by Douglas G. Woodward, City Planner, in 2006, covering a number of related topics including transfer of development rights, land use strategies and regulatory options for the area outside the urban growth boundary, as well as several TDR examples.

facilities, and to produce or protect affordable housing. The critical element in the transaction is how the density transfer is structured and managed by the municipality.

There are two primary density transfer structures that have been used in the United States:

- A developer seeking to build additional housing units negotiates the easement or fee purchase of open space directly with a private property owner and then deeds it to the town in exchange for added housing units in the receiving zone. Conversely, this approach could be initiated by the owner of an open space parcel seeking to sell a conservation easement. This is the classic TDR approach.
- Based on a formula established by a municipality, a developer makes a cash contribution to the municipality so that the municipality can directly acquire open space or conservation easements in the sending zone. In exchange, the developer is allowed to build additional dwelling units in the receiving zone. This approach is sometimes referred to as a density transfer credit or DTC. Some communities have used a TDR “Bank” approach to achieve a similar end result.

## **Transfer of Development Rights and Density Transfer Credits Compared**

### **Advantages of TDR:**

1. Places the burden of negotiating protection easements directly between sending owners and developers.
2. Real Estate market forces dictate the cost of the transfer – the city only needs to establish the ratio of protected land in sending zones to density bonuses given in receiving zones.

### **Disadvantages of TDR:**

1. The properties protected through easement acquisitions may not meet the priority needs or desires of the City and the Conservation Commission.
2. Developers may be less interested in pursuing TDR bonus units if the burden of acquiring TDR conservation easements is too high. In shaping a TDR program, the City needs to be aware that a successful program must remain attractive to developers who are working throughout the geographic region and potentially have other real estate opportunities in other zones and other communities.
3. Individually negotiated protection easements may result in some developers being able to negotiate better deals than others – raising the perception of unequal treatment.

### **Advantages of DTC:**

1. The City is able to manage the entire density transfer process through:

- a. establishment of transfer ratios,
  - b. density bonus levels, and
  - c. prioritization and acquisition of conservation easements.
2. Developers have certainty about the cost of density bonuses, reducing their risk and improving its attractiveness and the potential for program success.
3. Developers don't have to negotiate with individual property owners for conservation easements.

#### Disadvantages of DTC:

1. City is responsible for negotiating and acquiring conservation easements (which is the City's current practice).
2. City must manage the transfer credit funds until they are used.
3. If the transfer credit structure or density bonus provisions are not sufficiently attractive to developers, the program may not be utilized resulting in little or no open space protection. If a sufficiently attractive structure is established initially, periodic review and adjustment will be needed to reflect changes in real estate market economics.

#### What is the City's primary motivation in pursuing a development transfer mechanism?

The policy importance of open space protection versus allowing higher density residential development is critical in shaping how a development transfer mechanism is structured. The research conducted by Rick Pruetz<sup>2</sup> of 134 communities in the United States that have adopted some form of TDR, highlighted the many nuances of TDR regulatory structure and operation. The case studies in Pruetz' book make it clear that a TDR program needs to provide adequate **developer incentives** to take advantage of receiving area density bonuses if any significant open space preservation is to occur.

As a result of the many public input meetings, sub-committee sessions and discussions with both the Planning Board, the new City Master Plan is placing a very high priority on the preservation of its remaining rural landscape. Residential "greenfield" developments in the past 5-10 years have brought the community to the realization that rural land outside the urban growth boundary will be largely developed if stronger land use control measures are not pursued in the very near future. The new Master Plan now states that a transfer of development rights approach should be seriously explored as an additional open space protection mechanism for land outside the Urban Growth Boundary (or UGB). The plan goes further in suggesting that

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<sup>2</sup> Rick Pruetz, *Beyond Takings and Givings* (Marina Del Ray, CA, Arje Press, 2003).

additional density should be permitted inside the UGB to offset the reduced development activity outside the UGB.

## Legal Basis

The New Hampshire Revised Statutes Annotated includes specific language about innovative zoning techniques. RSA 674:21 “Innovative Land Use Controls” includes both direct and related references to TDR type regulatory provisions including:

- Intensity and use incentives
- Transfer of density and development rights
- Performance standards
- Flexible and discretionary zoning
- Environmental characteristics zoning

RSA 674:21 specifies in paragraph II that “An innovative land use control adopted under RSA 674:16 may be required when supported by the master plan and shall contain within it the standards which shall guide the person or board which administers the ordinance.” Case law on this specific issue is non-existent in New Hampshire, likely due to only a limited number of communities having adopted TDR provisions statewide.

In order to comply with the state law requirements, an innovative zoning provision needs to:

- Be supported by the master plan, and
- Contain standards to guide in the administration of the ordinance.

Since the new master plan documents the community discussions and city conclusions concerning the transfer of density from outside to inside the urban growth boundary, the master plan test is satisfied. This report is intended to define the parameters for creating a TDR ordinance and the necessary standards and process to make an ordinance fair and equitable, thereby complying with the second standard enumerated in the state law.

## Where Has TDR Been Most Successful?

If the goal of TDR is to protect a defined important municipal resource, then the success of a program would logically be based on how much of that resource was protected. Of the 134 case studies researched in Pruetz’ book, he highlighted a number of jurisdictions that had reasonable levels of success in achieving their goals. The following table “Successful TDR Programs in the United States” summarizes the experiences of these jurisdictional efforts.

## Successful TDR Programs in the United States

Page 1

Town/City	Population	Date TDR Established	TDR Goals	Program	Transfer Ratio	Density Bonus	Success
Montgomery County, MD	873,341	1980	Farmland Preservation	Sending zones were downzoned from 1 DU per 5 a. to 1 DU per 25 a. TDR allows owners to sell TDR credits at 1 per 5 a., creating a significant sellers incentive. Receiving zones are in 14 communities with a low base density and an optional TDR density set to not overwhelm existing neighborhoods. A TDR fund was also established to serve as a buyer of last resort for TDR credits.	1:5	Varies by receiving jurisdiction	40,000 acres of farmland protected
New Jersey Pinelands, NJ	n/a	1980	Protection of rural and unique ecosystems	Owners can sell Pinelands Development Credits (PDC's) based on the importance of the site's natural features. Receiving zones are in 23 different municipalities. State provides additional funds to supplement the protection of land with PDC's	1:4	Varies	31,400 acres preserved
Calvert County, MD	74,563	1978	Farmland Preservation	Base zoning allows one unit per 10 acre. TDR zoning permits the sale of 1 TDR credit per 5 acres.	1:2	150%	8,900 acres
Boulder County, CO	291,288	1989	Open Space Preservation	Sending zones are in county jurisdiction and receiving zones are in cities and towns.	Varies from 1:1 to 1:3	Varies up to 600%	Approximately 4,000 acres
Dade County, FL	1.9 million	1989	Protection of environmentally sensitive land in the Everglades.	Credits in sending zones are based on the degree of their environmental sensitivity. Strong environmental regulations discourage development in sending zones. Use of TDR's in receiving zones is not by right and requires a conditional use permit approval.	Varies from 1:5 to 1:40	Varies	Estimated between 1,065 and 8,520 acres
Long Island Pine Barrens, NY	1.3 million	1995	Protection of threatened and endangered wildlife habitat and water supply aquifer	Program has negative transfer ratios but owners are motivated by significant development restrictions in sending zones. This results in the program being nearly mandatory. Credits have to be used in the same municipality as the sending zone property. State provided financial assistance to establish a clearinghouse to buy and sell credits.	Varies	Varies up to 1000%	315 acres protected
Cupertino, CA	50,546	1973	Traffic management	City set a standard of no more than 16 one-way peak hour trips per acre along a street corridor. The TDR allows property owners to buy and sell TDR rights between owners in the corridor.	1:1	none	30+ transfers in 20 years
Los Angeles, CA	3.7 million	1975	Preserving historic landmarks, expanding affordable housing, public open space, public transportation and cultural facilities	City allows properties within 1500 feet of each other to be treated as one parcel in computing maximum density. A 1988 amendment requires transfers of more than 50,000 sq.ft. to pay a \$35 per sq. ft. fee to support affordable housing, open space, historic preservation, cultural & community facilities or public transportation improvements.	1:1	none	3.5 million sq.ft. has been built under these provisions.
Malibu Coastal Zone, CA	n/a	1979	Fragile hillside habitat protection	New lots along the Pacific Ocean cannot be created unless existing substandard hillside lots are permanently deed restricted. A local land trust receives transfer credits and acquires hillside protection easements.	1:1	none	924 substandard lots had been deed restricted by mid-1990's
New York, NY	n/a	1968	Landmark building preservation	Owners of landmark buildings can sell unused allowable floor area to other property owners. A second TDR was established in the South Street Seaport Historic District that allowed financial institutions to acquire development rights in exchange for forgiving delinquent loans in the preservation district. The building owners were then able to restore the landmark buildings. A theater district TDR was also established in 1998 which allows live performance theaters to sell unused floor area in exchange for deed restrictions to properly maintain the theaters and keep them in active live-performance use.	1:1	none	12 landmarks have been preserved - including Grand Central Station.





## Successful TDR Programs in the United States

Page 2

Town/City	Population	Date TDR Established	TDR Goals	Program	Transfer Ratio	Density Bonus	Success
San Francisco, CA	776,733	1985	Preservation of architecturally significant buildings	City reduced downtown development density in 1985 and allowed landmark building owners to deed restrict their buildings and sell excess density to other property owners who can then exceed the allowed building density.	1:1	none	In 2000-2001 City approved 14 sending sites and 10 receiving sites with a total area of more than 500,000 sq. ft.
San Luis Obispo County, CA	246,681	1980	Fragile coastal slope habitat protection	Coastal lots with slopes in excess of 25% are limited to new homes with no larger than a 400 sq. ft. footprint. Property owners can sell their land to a local land trust who preserves the property and sells the development rights to other lot owners who want larger building footprints.	1:1	none	230 lots have been protected.
Seattle, WA	563,374		Affordable housing, historic preservation, infill development	Owners of low income housing can transfer unused development rights to other downtown sites. Owners of landmark buildings can transfer unused development rights. Owners of infill developments can transfer unused development rights. Owners of office/retail developments can transfer unused development rights to other sites in the same block.	1:1	none	600 Units of affordable housing, preservation of two live performance theaters.
Tahoe Regional Planning Agency, CA/NV	n/a	1987	Water quality, natural resource and open space protection	Several programs are available to transfer density from sensitive areas to suitable development sites. This includes transferring density on undeveloped as well as developed sites. Developers who use transfer rights can bypass annual building permit quotas.	1:1	none	25-35 transfers per year resulting in restoration of 1.2 million sq. ft. of previously developed land and purchase of more than \$2.3 million in land protection.
Palm Beach County, FL	1.1 million	1980	Environmental and agricultural preservation	A TDR bank is used to acquire easements and sell density credits.	1:4	none	8,806 TDR credits sold by 2000, protecting thousands of acres of environmentally sensitive land.
Pitkin County/Aspen, CO	14,872	1994	Preservation of environmentally sensitive open space	The sending zone only permits cabins and alternative dwellings that do not exceed a footprint of 400 sq. ft. TDR's are allocated on the basis of one per 35 acres of sending zone land. Developers can purchase TDR's to exceed the 15,000 sq. ft. floor area limit in receiving zones and bypass the county's building permit quota system.	1:1	none	75 TDR's created by 2000 resulting in protection of 1,590 acres of sensitive land - which equals one-third of the of the county's preservation goal.
Berthoud, CO	4,800	2000	Preservation of farmland, environmentally sensitive areas and open space	Faced with rezoning requests that could result in an additional 700 housing units, the town adopted a fee in lieu of a standard TDR - or a <b>density transfer fee</b> . The fee is triggered by a zoning change that results in additional housing units. The town collects the \$3000/DU fee at time of building permit issuance and then decides what properties it wishes to protect. One of the reasons that they chose to use a fee structure was that the town could then control the quality and location of land & easement purchases. Alternately, a developer can secure a conservation easement on his own, subject to town approval of the parcel being protected, thereby avoiding payment of the density transfer fee.	1:1	none	313 dwelling units have been approved that are subject to the fee.

Source: Rick Pruett, *Beyond Takings and Givings* (Marinda Del Ray, CA, Arje Press, 2003)



## **TDR Experience in New England**

Case studies in Pruetz' book included twelve communities in New England (the town of Lee was the only New Hampshire municipality included in the study). In addition, the NH Office of Energy and Planning web site identifies Bedford, Dover and Lee as having TDR regulations. The table on the following two pages entitled "New England TDR Regulations Comparison" summarizes those communities' programs.

## New England TDR Regulations Comparison

Page 1

Town	Population	Date TDR Established	TDR Goals	Criteria	TDR same zone	TDR different zone	Transfer Ratio	Density Bonus	Success
Windsor CT	28,000	1976	Residential Density Transfer to areas of town with infrastructure to support development  Non-Residential TDR: to preserve historic, ecologic, aesthetic, agricultural and recreational resources	Sending site must be buildable. Town must find that receiving site is more desirable to develop. Sending site is dedicated to town. Town must also find that there are minimal impacts to receiving site abutting properties Sending site dedicated to town. Sending site determined to have important resource to protect for town. Transfer is for up to 50% of lot coverage	yes	yes	1:1	100%	13 acres
Brunswick, ME	20,906	1986	natural and historic resource protection	Sending sites could be any location that met eligibility criteria. Receiving site development had to be consistent with the Master Plan intent. It had to be on town water and be at least 10 acres in size.	yes	yes		1500%	repealed in 1997
Cape Elizabeth, ME	8,854	1982	environmental, scenic, agricultural, archeological and historic resource protection	Transfer zone defined. Sending sites need to meet specified criteria and a conservation easement recorded.	yes	yes	>1:1	10%-200%	0
Falmouth, MA	32,660	1985	coastal pond and groundwater recharge protection	Donor parcels must provide that they are developable. Recorded covenant. Minimum receiving site acreage requirements based on underlying zoning.	no	yes	Varies based on receiving zone	Varies based on receiving zone	20 acres
Groton, MA	9,547	1980	environmental, farmland and water supply protection	1988 amendments expanded to 25% density bonus to permit developers to exceed building permit quotas. Developers can use TDR for either density bonus or to exceed building permit quotas, but not both. Open Space residential and flexible development provisions compete with TDR density bonus provisions. Planning Board must determine that receiving site would not qualify as a sending site. Sending owners can deed restrict land at any time and hold their transfer rights for use or resale at any time.	yes	no	1:1	25% or ability to double number of allowed building permits per year.	500 acres
Northampton, MA	30,000	1993	protection of land in the farms, forests and rivers overlay zone	Transfer from sending zone approved by Planning Board if transfer criteria are met. Permanent preservation easements required. Development restrictions in sending zone encourage sale of TDR rights. Development rights transfer can be held indefinitely for receiving site until used. Receiving sites limited to a planned village development overlay zone. Density bonuses typically allow higher density on receiving sites than developers need. Transferred unit rights are by-right in receiving zone - reducing a developer's risk.	no	yes	1:1 or greater	Ability to exceed the 30% limit on residential use in receiving zone.	0
Sunderland, MA	3,700	1975	farmland, environmental and watershed protection	Sending areas are located in three overlay zones where special permits re required to develop - and only after proving that non-development alternatives have been explored (including sale of TDR rights). Sending sites must have permanent easement recorded. Receiving sites can not be in an overly zone.	yes	yes	1:2	25%	1 transfer
Townsend, MA	9,000	1991	passive recreation, conservation, forestry, agriculture and natural buffer protection.	Sending sites must meet minimum criteria. Recorded deed restrictions are required. Receiving sites can get exemptions from some development requirements and receive a density bonus	yes	yes	1:1.2	variable	0



## New England TDR Regulations Comparison

Page 2

Town	Population	Date TDR Established	TDR Goals	Criteria	TDR same zone	TDR different zone	Transfer Ratio	Density Bonus	Success
Bedford, NH	18,274	2000	clustering between two adjacent parcels	Essentially an expansion of cluster provisions to permit multiple parcels to be part of the entire cluster proposal.	yes	yes	1:1	0	
Dover, NH	26,884	1990	farmland, environmental, groundwater, historic and open space protection	TDR Overlay zone. Sending site must be at least 1 acre for industrial and 5 acres for residential zones. Sending site must have recorded preservation easement. Planning Board can waive some receiving site requirements as long as development is consistent with master plan and not out of character with surrounding development.	yes	yes	1:1	variable	
Lee, NH	4,145	1994	farmland, open space, forest, watershed and other natural resource protection	Sending and receiving sites must be contiguous. Recording of preservation easement required. Density of development parcel cannot exceed allowed density of both parcels (sending and receiving).	yes	no	1:1	0	0
Jericho, VT	5,015	1992	open space and prime agricultural land protection and encouraging development in new or existing villages with mixed land uses.	Preservation easement required on sending site.	no	yes	1:1	100%	0
So. Burlington, VT	15,814	1992	preservation of agricultural, open space, scenic and environmental resources.	Sending and receiving areas are in same zone. Owners in sending areas are limited to developing a PRD with density transfer. Planning Commission can approve a PRD in sending area as long as it is consistent with the intent of the TDR zoning. Preservation easements can be required.	yes	no	1:3.3	233%	45 acres
Williston, VT	7,650	1990	preservation of open space and rural character and steering growth to areas served by public sewer.	Less density transfer than is permitted on a sending site. This is due to poor development potential of sending sites. Preservation easement must be recorded.	yes	yes	1:1	Varies based on sending and receiving zones	0

Sources: Rick Pruett, *Beyond Takings and Givings* (Marinda Del Ray, CA, Arje Press, 2003) and various town regulations

Drawing from the case studies in Pruetz' book, the following TDR regulatory criteria are common:

- Most ordinances demand a recorded open space protection easement as part of the TDR transaction.
- Sending site acreage must meet minimum criteria and be buildable land.
- Density bonuses in receiving zones range from 25% to several hundred percent.

Factors that influence the success of a TDR program are:

- The strength of the local economy and real estate market – in other words, how much demand is there for development in the receiving zone?
- Relative financial attractiveness of a TDR receiving zone as compared to other opportunities in the local real estate market – or, can developers reduce their risk and obtain a better return on their investment somewhere outside of the TDR receiving zone?
- The size of the receiving zone – Are there enough properties that could take advantage of a TDR density bonus provision?
- The relative ease of obtaining approval for TDR credits in the receiving zone – Is it harder or easier for a developer to obtain approvals with TDR bonuses or under the base zoning?
- Are there sufficient disincentives for property owners in the sending zones to not develop their land and thereby encourage the sale of conservation easements?

## **Concord Real Estate Economics**

In order to understand the current real estate market dynamics in Concord, C.W. Thompson Consulting, LLC was retained. Charles Thompson has an extensive background as a real estate appraiser with considerable experience in open space protection easement valuation. He examined the present real estate market in Concord to understand the value of rural land both with and without open space protection easements as well as the value of land within the suburban residential zoning districts. His primary conclusions are:

- Recently, developers have paid between \$30,000 and \$40,000 per approved residential dwelling unit for developable land.
- Because larger tracts of land have a lower price per acre, a smaller parcel that is located closer to town would command a per unit price on the higher end of that range.

- Rural land sales without any open space development restrictions range from a low of \$1,000 per acre to a high of \$10,000 per acre.
- Concord area land sales where open space protection easements are in place range between \$2,300 and \$3,000 per acre.
- Land sales with open space protection easements in the broader central New Hampshire region extend that per acre price range to between \$165 and \$4,000.
- The presence of open space protection easements lowers underlying property values by 10% to 80% of the value of similar unencumbered land.

Thompson cautions that there are many variables that contribute to the purchase price for any property and it is risky to generalize a set of specific land sales to establish a market “average.” This is particularly true with rural real estate where difficult topography, extensive wetlands and other environmental constraints can significantly influence development potential. For the purposes of order-of-magnitude comparison, Thompson’s conclusions suggest that acquisition of conservation easements in the Concord area might cost in the range of \$6,000 to \$7,700 per acre. This per acre estimate is consistent with the recent conservation easement purchase at Dimond Hill Farm which resulted in an average easement purchase price of \$7,541 per acre on the 104 acre property.

Most of the land outside of the UGB is zoned to require a minimum of two acres of useable land per house lot which suggest that acquisition of conservation easements might cost \$12,000 to \$15,000 per buildable lot. Comparing that cost range to a likely density bonus fee of \$35,000 to \$40,000 suggests that for every density bonus unit developed inside the UGB, the equivalent of about two or three house lots could be protected as permanent open space in the rural parts of the city.

### **Marketability and Viability of TDR**

If TDR provisions are intended primarily to result in significant open space protection, then they need to be economically attractive to developers, both for the specific development project at hand as well as for the broader city and regional real estate market dynamics. Key issues that influence TDR viability relate to sending area and receiving area densities, what “transfer ratio” is applied, and to the complexity of the regulatory approval process.

For a developer, this issue is a straightforward matter of time and money. If the cost of obtaining density increases in a receiving zone project is attractive – in both time and money - then he will likely pursue the project. If the land cost of each density

bonus unit is the same or higher than his raw land purchase price, the developer would have less motivation to pursue it. Similarly, if the TDR bonus approval process is more complicated and/or time consuming, it will not receive much interest or support.

### *Cost Incentives*

The most direct method of assuring success for a TDR program is to set the density transfer cost at a level that is below the price a developer would otherwise pay for land on which to place each additional dwelling unit. The closer the density bonus cost per unit is to the developer's market driven per unit land cost, the less motivated he will be to pursue the bonus. The key question is, what does a developer pay for an undeveloped property with or without the development approvals in place? The market research completed for this study indicates that, on average, developers currently spend upwards of \$40,000 for land on a per unit basis. By comparison, individual house lots are selling for approximately \$100,000 per lot. This cost differential accounts for the developer's costs of obtaining approvals for his subdivision, designing and building roads and utilities, and his profit.

It stands to reason that if a developer must spend \$40,000 to acquire raw land for each new home built under standard zoning conditions, spending less than that amount for each additional density bonus unit could be even more attractive. The bonus density units could be even more attractive if the developer has already built his road, utility and design costs into his base density calculations. Based on the successful TDR programs documented in Rick Pruetz' book, a 20% discount in the cost of a TDR credit for each density bonus unit should produce a meaningful incentive for developers to participate in the program. If a development transfer credit approach was selected as the transfer mechanism, each density bonus would cost a developer about \$32,000 and potentially enable the city to acquire between 4.1 and 5.3 acres of conservation easements.

### *Regulatory Process Incentives*

Changes in regulatory structure to the Groton, MA ordinance offer an excellent example of how ordinance structure and incentives influence its success. Groton originally established a TDR provision with a 25% density bonus. With the Town's limitation on the number of building permits issued each year, developers were much more attracted to accessing more permits each year than obtaining a density bonus. When the Town amended their TDR regulation to offer double the number of building permits each year for one development, their TDR program became much more attractive and has been used steadily since the change.

*Reduce or Eliminate Other Regulatory Incentives in the Receiving Zones*

One method of incentivizing TDR is to lower the base zoning density in both the sending and receiving areas and then provide for density bonuses to be acquired in a receiving area development. Density bonuses can be further enhanced by allowing for a transfer ratio greater than one-for-one. Based on the market economics discussed earlier in this report, conservation easements can be acquired at a lower cost per building lot than the likely cost of a discounted TDR bonus unit fee.

In order to achieve significant open space protection goals, the City should seriously explore some level of density reduction with a corresponding TDR bonus purchase. While lowering base densities somewhat may be politically difficult, providing higher density bonuses inside the urban growth boundary – sufficient to create strong developer interest – could trigger even stronger abutting land owner resistance to new development.

To make the city's development regulations thoroughly consistent with the goal of maximizing open space protection outside the UGB, the zoning ordinance, site plan and subdivision regulations need to be carefully scrutinized. Any density or development incentives in either the sending or receiving zones that compete or conflict with the TDR approach should be repealed.

*Development Approval Efficiency*

A thoroughly documented Density Bonus Provision that reduces the regulatory approval time and enhances the certainty of developer approval if the bonus regulations are satisfied, would significantly improve the marketability of the bonus provision. If a comprehensive density bonus provision is adopted, a developer should be assured that he can work through the approval process more quickly than under conventional zoning. Furthermore, development density bonuses acquired through a TDR/density bonus regulation need to be "by-right." In other words, the bonus units can not open for debate as part of the development approval process. To achieve this degree of confidence in the bonus density approach, the City needs to be committed to the entire TDR process that is adopted.



## Summary of Options and Decisions

1. Clearly define primary purpose of development transfer approach.
  - a. Open Space Protection outside urban growth boundary
  - b. Added density inside urban growth boundary
2. Pursue traditional transfer of development rights (TDR) approach or a density transfer credit (DTC).
3. Lower the base zoning density in the sending and/or receiving areas.
4. Determine the transfer ratio or bonus level in the receiving areas.
5. Make base development regulations in the sending and receiving zones less desirable by removing or significantly reducing other conditional use permit provisions or potential density increases.
6. Allow density bonuses “by right” if the developer purchases them and follows density bonus criteria.
7. Determine whether receiving areas should be limited to specific zoning districts or more broadly applied as a residential overlay zone that permits higher density in all residential areas as long as it complies with established neighborhood density and bonus criteria (that need to be codified as part of the TDR regulatory structure)

## How would a TDR approach work on a real project?

An on-going parallel research effort for the City by this consultant on Traditional Neighborhood Character includes an evaluation of several residential developments and how many additional residential units might have been able to be built if a TDR/Density Bonus ordinance had been in effect at the time. A recent eleven lot subdivision inside the UGB was identified as a good in-town example of a development that could have benefited from a density bonus provision. Based on the evaluation from the Traditional Neighborhood Character research effort to date, up to nine additional lots with a total of 34 dwelling units (23 bonus units) may have been able to be constructed on the property and fit in with the character of the existing residential development along the adjacent streets.

If a Density Transfer Credit program was in place, the developer would design his development in accordance with the Traditional Neighborhood Bonus standards and submit it to the City for review and approval. As part of the final project approval, the developer would provide the per unit density transfer credit (DTC), the plan would be recorded and the developer would proceed with the project construction. Using the \$40,000 per unit land cost and discounting it by 20% would result in  $(\$40,000 - 20\% \times 23)$

bonus units) a DTC of \$736,000 which would be deposited in the City's Conservation Fund. The Conservation Commission would then negotiate acquisition of conservation easements on high priority rural property and use the DTC to pay for it. If the conservation easement acquisition price was \$7,500 per acre, 98 acres of land would have been protected from this one density bonus project.

## **Conclusions**

If the City's goal is to preserve rural open space, a development transfer program must be financially attractive to developers so that they will actually use it. The traditional application of TDR is too cumbersome to effectively secure open space preservation easements on the land parcels that are most highly valued by the City and Conservation Commission. A Density Transfer Credit approach removes the need for a developer to have to negotiate the acquisition of a preservation easement with a private owner and allows the City to manage and implement its open space protection priorities. While it simplifies the process for the developer, it does place a burden on the City and the Conservation Commission to identify and negotiate easement purchases.

A properly structured density transfer credit should motivate developers to take advantage of it and the City will then have the financial resources to preserve its rural landscape. If the City decides to pursue a density transfer structure to achieve its goals, it is recommended that the following objectives be pursued:

- The primary purpose of the TDR approach should be to preserve open space outside the urban growth boundary.
- In order to accomplish this, a Density Transfer Credit approach should be established that provides ample regulatory and financial incentives for developers to take advantage of transfer credits.
- A density transfer credit fee of \$40,000 per bonus unit should be initially established with a 20% discount to incentivize the program. The level of density bonus inside the UGB should be tied to building and lot dimensions and "height and bulk" standards that mirror existing livable neighborhoods in Concord (which is the focus of a parallel research effort on Traditional Neighborhood Character).
- The City should further consider reducing zoning densities outside the UGB to one DU per four acres.
- The decision about offering bonus levels in specific zoning districts or as a residential overlay zoning provision citywide should be reviewed after the density bonus design standards have been accepted. This will allow the City and the public to consider the desirability of permitting additional

“infill” housing in existing neighborhoods if they are consistent with the character of the existing development.

- Density bonus fees need to be reviewed and updated on an annual basis. Annual adjustments should be made based on increases in the average assessed value of undeveloped land in Concord, as determined by the City Assessor and reported to the State of New Hampshire.
- In order to keep the density bonus fee up to date, a real estate appraiser should be retained every 3-4 years to evaluate current market conditions and advise the staff and Planning Board regarding any needed adjustments to the fee structure and ordinance.

### **Density Transfer Credit Ordinance – Outline**

Once the City has made determinations on the objectives presented above, three regulatory provisions need to be shaped and enacted by the City. First, the zoning ordinance needs to be amended to establish the conditional use permit structure and conditions for a DTC as either an overlay provision in all residential districts inside the UGB, or specifically in the RM and RS zoning districts. Second, the zoning ordinance needs to establish density and dimensional standards that are appropriate for the development of higher density DTC projects. Third, the site plan and/or subdivision regulations need to be amended to establish detailed design criteria required for all DTC projects. The zoning ordinance amendments need to include the following elements.

#### **Development Transfer Credit Ordinance**

1. Purpose
2. Definitions
3. Applicability – DTC is an optional provision in specified zones. The underlying zoning provisions apply otherwise.
4. Designation of Sending and Receiving zoning districts
5. Procedure
  - a. Preliminary consultation with city staff
  - b. Conceptual review with Planning Board
  - c. Planning Board approval
  - d. Recording of approved plans with DTC requirements, number of bonus units and density transfer fee clearly defined
  - e. Density transfer credit fee paid at time of building permit issuance
6. Conditional Use Permit criteria
  - a. Dimensional standards: height, bulk, setbacks, minimum open space per dwelling unit, maximum density

- b. Building and neighborhood design criteria and community compatibility
- 7. Establishment of density transfer fee and required periodic review and amendment
- 8. Establishment of density transfer fund, administration and allowed uses of density transfer fees.

Rockingham Regional Planning commission is nearing completion on a TDR report and model ordinance specific to New Hampshire.<sup>3</sup> Their work is as part of a larger project being coordinated between the regional planning commissions, NHDES and NHOEP to provide sound information and examples on innovative land use concepts. A copy of their draft report and model ordinance is attached. It serves as a very good starting point for a Concord ordinance that utilizes the development transfer credit approach.

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<sup>3</sup> *Innovative Land Use Planning Techniques: A Handbook for Sustainable Development*, expected publication date July 2008, prepared as part of the Regional Environmental Planning Program by the NH Department of Environmental Services, the NH Association of Regional Planning Commissions, the NH Office of Energy and Planning, and the NH Local Government Center.



## **ATTACHMENT**

DRAFT: Density Transfer Credit Ordinance (3-28-08, by Rockingham Planning Commission, Exeter, NH)





# DENSITY TRANSFER CREDIT ORDINANCE

***Related Tools:*** *Conservation Subdivision; Village Plan Development & Village Zoning; Lot Size Averaging; Steep Slope and Ridgeline Protection*

## I. Background and Purpose

### A. Introduction

Many, perhaps most, communities in New Hampshire have Master Plans that advocate protecting natural resources and important conservation lands, preserving open space, saving what is left of their rural character and working landscapes and preventing sprawl. These are core values for most communities. Yet despite the best of intentions, most existing zoning ordinances, no matter how well crafted, will not achieve these goals. On the contrary, communities, especially in southern New Hampshire, who 30 years ago thought they had protected themselves from excessive development by adopting low density development requirements have found instead that these policies have resulted in a kind of hypersprawl. Density is relatively low (e.g. 1 to 3 acres per unit) but development, especially residential development, is occurring everywhere that land is available and buildable. Such policies, where applied town-wide, have unwittingly encouraged sprawl by spreading development across the landscape and increasing the amount of land ‘consumed’ for each unit of development. Conventional zoning tools as applied in most New Hampshire communities are not designed to prevent development from occurring on land that is physically suitable to support it, even though that may be the community’s objective.

At its essence, zoning is the legal framework used to direct the type, density, and location of land use in a community, but it is limited in its ability to prevent all development from a site. In rapidly growing areas like southern New Hampshire, virtually all buildable land has inherent development value. Since zoning ordinances must permit at least some reasonable economic use of land (which today usually means development of some kind), it is reasonable to expect that, so long as our regional economy continues to grow, all developable land that is not protected by easement or purchase will, *eventually*, be developed.

Under conventional zoning, the only sure way to permanently protect land from development is to acquire it -- and increasingly, that means buying it. Yet it is unrealistic to expect that sufficient public funds will ever be available to acquire all the land in any community that should

remain undeveloped.<sup>4</sup> Even if the funding were available, acquiring large fractions of the remaining developable land would dramatically bid up land prices and cause other harmful consequences. High land prices would worsen housing affordability problems and increase the cost of conservation acquisitions to unsupportable levels.

The concept of **transferring development rights** (and the variation discussed here, the density transfer credit) was devised several decades ago as a potential solution to the problem of preventing or discouraging development in places where it is physically feasible but undesirable for one or more reasons. While it has met with only partial success as a zoning technique, recent variations show promise in overcoming the common barriers that have prevented more widespread use. The model presented here is based on one of those variations.

### ***B. Transfer of Development Rights Explained***

Simply stated, Transfer of Development Rights is a zoning technique used to redirect future development potential from one location to another in a way that is fair and equitable to the landowners involved and that supports community development, planning and conservation goals. TDR programs allow for the development value associated with one property to be sold and removed from that property and bought and added to another. In so doing, TDR creates and uses market incentives to stimulate the voluntary redirection of development away from the places a community wants to save and to the places where it wants to grow (Pruetz 2003). It does so without necessitating expenditure of public funds in the acquisition.

TDR programs are not intended to control the *amount* of growth in a community, but rather to direct **where** and at what **density** that growth occurs. In addition, TDR avoids the consequences (and criticism) of bidding up land and housing prices due to scarcity caused by a “conservation only” strategy because additional development opportunities are created to offset the development rights removed from the areas to be conserved. As more fully explained below, the term **density transfer credits** (DTC) is a specialized, and greatly simplified variation of the conventional transfer of development rights concept.

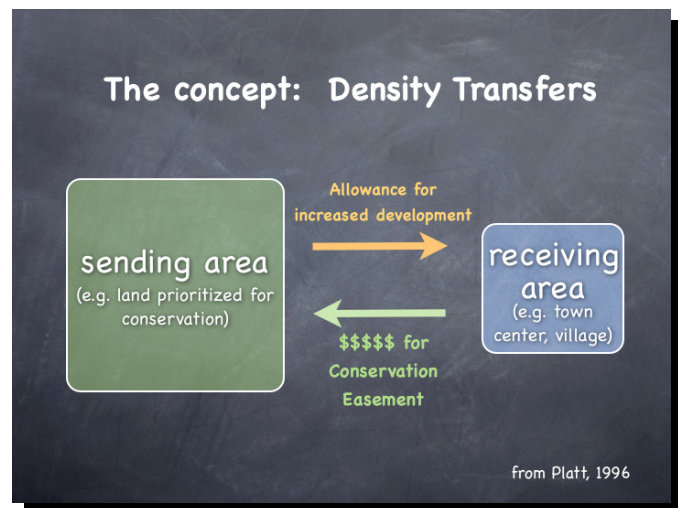
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<sup>4</sup> For example, the Land Conservation Plan for Coastal Watersheds (NHEP/NHCP, 2006) identified 190,400 acres (34%) of land in the coastal watersheds that provide essential habitat and/or ecological services and that should not be developed. Less than a quarter of that area is protected today. It is unlikely that much of the balance, some 150,000 acres, will be protected through conventional public or private conservation efforts alone.

Conventional TDR requires the establishment of **sending** zones or areas and **receiving** zones or areas, and relies on an active real estate market with sufficient growth to stimulate the sale and transfer of development credits. Sending zones are the land areas the community seeks to protect from development (e.g. conservation lands, agricultural lands, water supply protection lands, critical habitat, etc.). Receiving zones are the areas where the community wants to grow – such as village or town centers (new or old), special development districts, established residential areas capable of accepting “in-fill” development, etc. Ideally, receiving areas are places with supportive infrastructure already in place (roads, public water and/or sewer), and perhaps close to employment centers and municipal services such as schools, community services and public transportation.

Zoning in the receiving areas is modified with the establishment of a TDR program to allow for an additional development increment or bonus *which can only be accessed by purchasing a development credit from land (or intermediary ‘bank’) located in the sending area*. Proceeds from the sale of development credits is used to purchase permanent deed restrictions or conservation easements in the sending area.

While simple enough in concept, conventional TDR programs have proven to be too logistically complex to achieve widespread adoption, especially in smaller communities (where arguably they can do the most good). There are at least five important barriers:



- ☐ The pre-designation of sending and receiving zones requires considerable upfront planning and may engender opposition on both ends -- by residents in receiving areas who want no additional development in their neighborhoods, and by sending area landowners who perceive that their right to develop will be diminished or hampered;
- ☐ They require the development of a real estate “market” and related mechanisms for the buying and selling of transfer credits;
- ☐ They are considered new and unproven in most areas, and few applicable models and examples exist;
- ☐ They are perceived as viable only in communities that have areas serviced by public sewer and/or water systems; and
- ☐ They add complexity to the administration of the subdivision and site plan review process.

In addition to these, a more general challenge is developing sufficient understanding of the local real estate market to “price” development credits correctly so that they are both attractive to developers to buy (i.e. they will be profitable to use) and yet generate sufficient benefits to the community (i.e. funds to buy the offsetting conservation easements). Achieving the right balance will likely require both expert advice and some trial and error. What’s more, the “right” price for density credits will differ from one area of the state to another and by type of development (e.g. multi-family vs. single family).

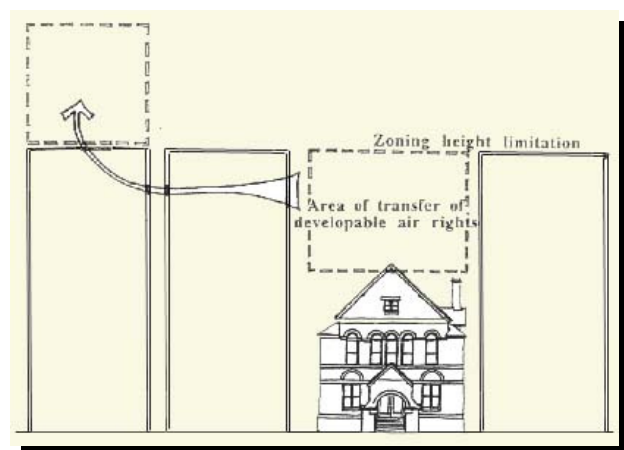
These challenges are real, but not insurmountable. With close to 50 years of sprawl to draw upon in our collective experience, it can be reasonably asserted that some form of successful development rights transfer will be a necessary component of zoning in any growing community that is serious about protecting a significant portion of its remaining undeveloped land for open space and conservation purposes, while creating a more compact development pattern elsewhere.

### **C. History**

The concept of TDR evolved in the mid 1960s and the first transfer of development rights mechanism appeared in the New York City Landmark Preservation Law in 1968. There it was used not as a mechanism to protect open space, but to protect historic landmarks from demolition and redevelopment by allowing their owners the option of transferring unused development density rights to adjacent properties (usually in the form so called “air” rights - the ability to build higher). Since then, nearly 200 TDR programs and variants have been adopted across the country. The most well known and successful of these include TDR programs focused on the preservation of unique or highly valued resources such as in Calvert and Montgomery Counties, Maryland, through which over 50,000 acres of farmland has been preserved to date; the California Coastal Commission TDR program which focuses on reducing the number of substandard lots in the coastal zone; the New Jersey Pinelands TDR which has protected over 30,000 acres of pine barrens, and the Tahoe Regional Planning Commission TDR program which transfers development away from sensitive shoreland (Pruetz, 2003). The most successful and well known TDRs have been regional in scale; however, a number of successful local municipal TDR programs exist as well.

#### *Little Used in New England*

Adoption of TDR has been a slow process in New England. This is likely attributed to the barriers listed above, as well as the fact that land use control is retained at the town level (rather than county or regional level) where market and administrative barriers to TDR are harder to overcome. Nationwide, the most successful uses of conventional TDR have been limited to communities, counties, or regions of



sufficient size and real estate market activity to allow the relatively free trading of development rights. In smaller markets, such as at a town level, the probability that a developer will find available sending property with which to trade or transfer development rights is low and so the market demand is harder to establish.

### *Renewed Interest and new Models*

Despite the inherent challenges, as towns in New England have attempted to combat sprawl (mostly unsuccessfully) there has been a renewed interest in density transfer zoning provisions. As of 2002, at least 17 are in place, including five in Massachusetts, three in Vermont, two in Maine, and one in Connecticut, (Pruetz, 2003). At least two communities in New Hampshire (Lee and Dover) have density transfer provisions in their zoning ordinances. Several others are known to be actively working on implementing some form of TDR.

Equally important to this renewed interest is the development of new simplified approaches to TDR that overcome or lessen the barriers that have prevented its widespread adoption in the past. Most notable was the creation in 2000 of a first-of-its-kind TDR program in the Town of Berthoud, Colorado (population 4,800) that does not involve identifying fixed “receiving” zones and allows the use of a fee as the density transfer mechanism. This important innovation has lowered the barrier for enacting TDR in smaller communities and is the basis of the model ordinance contained in this Guidebook.

## **II. Appropriate Circumstances and Conditions of Use**

### **A. General Applicability**

Density transfer ordinances are potentially useful in any New Hampshire community that seeks to preserve important natural or cultural resources and has done the necessary planning to support its use. In concept, Transfer of Development Right ordinances or as the newer approaches are more commonly called, “Density Transfer Credit” ordinances, are adaptable to a wide variety of circumstances and objectives. Appropriate circumstances can range from an urban community wishing to preserve historic sites under pressure for redevelopment, to a growing suburban community wishing to displace future highway commercial “strip” development to a more centralized node or downtown area, to a small town seeking to preserve open space while promoting the creation or expansion of a village or town center.

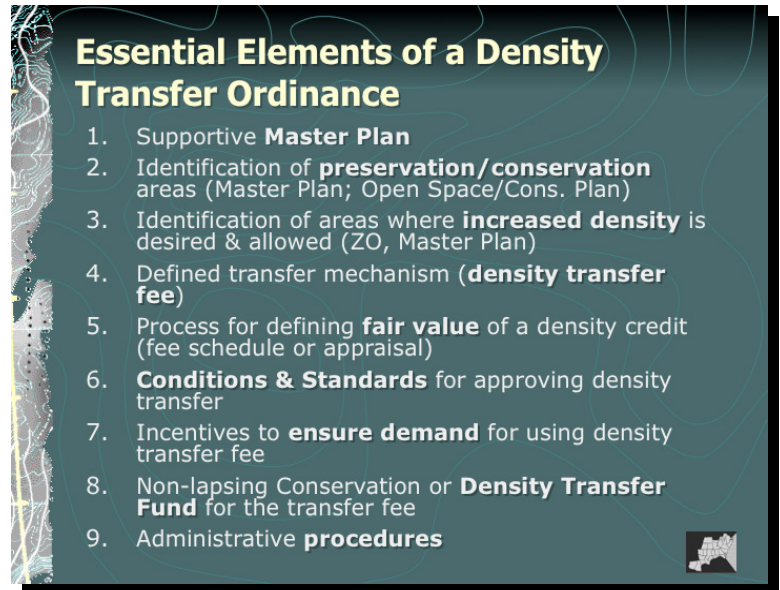
For the purposes of this Guidebook, the use of the model density transfer ordinance will consider residential development only and focus on circumstances where land conservation and the creation of higher density neighborhood or village development are the principle objectives. This is the type of application where density transfers have been most commonly and successfully used in the past and where the greatest interest in them in New Hampshire appears to exist. It should be noted however, that density transfer can also work with commercial and industrial development as well, as have been successfully done in Dover.

## B. *Elements for Success*

In the book *Beyond Takings and Givings* the author surveys 142 existing TDR programs and ordinances in use across the country. Of these, only 20 are considered by the author to be highly successful in terms of density transfers achieved; nearly 50 more were moderately successful and the remainder – about half of those surveyed -- have not been used successfully at all, even though many have been in place for a decade or more. Given this poor track record it is especially important to focus some attention on the conditions and “pre-requisites” that can yield success (Pruetz, 2003).

Fortunately, the pre-requisites for implementing a density transfer credit style ordinance are significantly less than for a conventional TDR program, and more appropriate and workable for smaller New Hampshire communities. Nevertheless, a number of pre-requisites do exist. Specifically, a town will need to update its master plan to support the density transfer concept, identify areas appropriate for increased and decreased densities, establish an appropriate value for density credits, setup a non-lapsing local account for the density credit fees

and ensure the administrative capacity and knowledge to properly administer the ordinance. *None of these requirements place the use of density transfers out of reach of the typical New Hampshire community.* Technical assistance may be required to update the master plan and prepare an ordinance, but the administration of the ordinance is no more complex, and probably less so, than most growth management and impact fee ordinances. The remainder of this section explains the pre-requisites identified, and how they may be addressed.



### 1. *Master Plan*

To successfully use and support a DTC program, a community must have (or update accordingly) a Master Plan which articulates and supports the objective of transferring future development density from areas containing natural resources that should be conserved to areas where additional development can be accommodated. Ideally, the Master Plan would identify specific sending and receiving zones (e.g. in the Future Land Use Chapter), but at a minimum, would specify the conditions and criteria that qualify specific types of land suitable for increased or decreased density and identify generally the areas that meet these criteria. To support the density-transfer-credit (DTC) form of TDR it is only necessary to generally identify the areas in

the community where increased and decreased development density would be appropriate and desirable. It is also important that the master plan articulate the public purposes that will be served by offering the transfer of future development.

## 2. *Identification of Conservation Areas (Sending Areas)*

Many communities in New Hampshire that have developed natural resources inventories (NRIs) have already taken the first steps in identifying appropriate areas for reduced development density. An NRI which identifies areas of the community as having important resource values for purposes such as water supply protection, flood storage, habitat protection and even carbon sequestration can serve as a solid foundation for identifying the sending areas of the DTC ordinance. Often these areas will be synonymous with conservation or resource protection areas identified in conservation and open space plans. A local open space or conservation plan, which may be adopted as part of the master plan, typically identifies parcels or groups of parcels which the community has declared are in its long term interest to conserve. If the Town has such a plan, that will be a good starting point for identifying the areas where future development should be avoided, and thus for defining its sending area(s).

In addition to local conservation plans, many towns in New Hampshire have access to larger scale resource inventories and analysis that can be used to identify sending area conservation lands. For example, the State Wildlife Action Plan has provided resource co-occurrence mapping for all areas of the State showing the area with high value wildlife habitat (NH Fish and Game 2005). Such areas correlate well with other local resource protection values, such as open space, shoreland, wetland, watershed, floodplain and aquifer protection.

A more detailed regional conservation plan has been developed covering the 42 communities within the coastal watersheds (eastern Rockingham and Strafford counties) which includes extensive resource co-occurrence mapping and identification of 75 “core” and “supporting” conservation areas representing the most important lands and ecological systems to retain for conserving living resources and water quality (The Nature Conservancy 2006). A similar plan exists in the southwest region covering the 27 communities in the Asheulot River Watershed (The Nature Conservancy 2004). In addition, the 26 communities in the NHDOT’s I-93 Community Technical Administrative Program (CTAP), have access to regional scale “natural service network” (NSN) maps prepared by the Jordan Institute and the UNH Center for Complex Systems Research, which show individual and co-occurrences of water supply, flood protection, and agricultural resources.

Any of these resources together with existing local conservation plans and resource analyses can form a good basis for identifying DTC sending areas -- where density transfer fees would be used to acquire conservation easements.

## 3. *Identifying Areas Appropriate for Increased Density*



Finding locations in a community where increased density is to be permitted may be the most challenging part of implementing a TDR or DTC ordinance. Depending on how much additional development is allowed and what exists to start with, residents in these areas may resist the change, especially if it appears that other parts of the community are benefiting at their expense. Several strategies may be considered; they are not mutually exclusive.

- a. Density Increase by “Petition” or Permit: One approach, and the one adopted in the model ordinance included in this chapter, is to allow for an incremental density increase in all residential development zones (except for those identified as sending areas). The increased density would be initiated by a request or petition from a developer during the plan review process and subject to conditional review and approval. With this approach, the additional density is not given by right, but by condition based on circumstances and an established set of criteria and is evaluated on a case by case basis. Thus, the decision about additional density in each zone is not provided ‘by right’ or decided ahead of time in the zoning ordinance, but deferred to the Planning Board to be decided in each case. The form of density increase could vary as well. For example, in a downtown or town center district, it may be most appropriate to allow both increased building height and lot coverage as the format for gaining density. In a moderate density residential zone with sewer and water, allowing medium scale multi-family development where none is permitted may be appropriate. In a low density residential area where houses rely on on-site septic systems, a modest density increase – perhaps 30% or 50% -- depending on the starting minimum lot size site conditions, might be appropriate. The “by petition” approach avoids the need to rezone areas as receiving or “upzoned” areas and allows the Planning Board to control the outcome. It has the disadvantage of placing the burden for these decisions solely on the Planning Board, and makes for an uncertain outcome for the developer.
- b. New Town Center or Village Zone: Another, very different approach is to create an entirely new district where significantly increased zoning densities are permitted. A clear example of this is establishing a new or expanded Town Center or Village District. This approach has the advantage of tracking the “upzoned” area to one where increased density is essential to the objective of establishing the zone. Disadvantages are that more upfront planning work is required to identify locations for a new zone and to achieve consensus in the community about its designation, especially from existing residents in the proposed district.
- c. Brownfields Redevelopment: Brownfields, previously contaminated sites that have potential for remediation and redevelopment, present a natural opportunity for increased density and can further the “win-win” that characterizes Brownfields development in general. Even if the new development is non-residential, the added value to the developer from increased density can be captured as a density credit and used in the conservation areas.

- d. Sewer and Water Districts: A straight forward approach is to establish increases in existing development density within existing (or planned) sewer and water districts, where higher densities are most easily supported. Such district may already be developed as much as is desired by the community, while others may be developed only in limited sections and have opportunities for greater density. Strategic extensions of sewer and water lines into areas where increased density is desired can work well with this approach.

The decision of where to “up zone” needs to be approached in the context of a successful and open planning process. The rationale and the approach should be documented in the future land use section of the master plan.

As indicated, the strategy in the model in Section V, is most similar to that described in “a” – by petition or permit – and was chosen for two reasons: it is easier to establish and allows for small increments of increased density to be captured in most, if not all residential zones. Any community that is contemplating the adoption of a density transfer ordinance should be mindful of zoning amendment proposals not connected to a DTC that would have the effect of increased development density from existing standards. They present an opportunity to generate density transfer credits that will be lost if put in place before a DTC ordinance exists.

#### 4. *Defining the Transfer Mechanism*

Density transfer ordinances must specify how the density credit is moved from sending to receiving areas. In many versions of TDR, developers must obtain certificates of density credits in order to build at higher densities in the receiving area. The credits are issued by the community in exchange for conservation easements on land in the sending area obtained by the developer. The developer is responsible to obtaining the easements on which the credits are issued. Since this exchange has to be accomplished upfront, this often discourages the use of TDR. It takes time, and furthermore assumes that conservation easements are readily obtainable. This is often viewed as the key barrier to the more widespread use of TDR provisions that are in place.

The approach used in the model in this Guidebook uses a novel approach pioneered by the Town of Berthoud, Colorado, to address this problem by which the community accepts a *density transfer fee* in place of the actual conservation easements. The fee is used to purchase the easements, either at that point or at a later time. By “monetizing” the transfer mechanism, ease and speed in the transaction is provided to the developer and flexibility is provided to the community. For the developer, the fee approach removes the uncertainty and delay involved with finding willing landowners in the sending area with whom to negotiate conservation easements. For the community, it provides more opportunity for choice in selecting which conservation lands to acquire, and when. The community could also pool multiple transfer fees over time and make larger, more strategic acquisitions when conditions are right. It could also

allow them to leverage density fees with other acquisition grant sources such as state or federal land protection programs, or partner with regional land trusts.

The clear benefits from this approach do come with a down side: the community is not actually receiving a known amount of conservation land for the density credit given. Rather it is receiving the money to buy it. There is a risk that the amount of land that can ultimately be negotiated for the fee in hand will be less than what is expected for the density credits given. This risk can be controlled by setting the cost of density credits appropriately, and by understanding what conservation easements on the lands being sought will, on average, cost to acquire.

## 5. *Market Analysis: Establishing the Value of Density Credits*

Properly setting the value of density credits is critical to a well functioning density transfer ordinance. It is not necessarily easy to do, and may require outside expertise. As previously explained, the value of credits must be low enough to generate interest from developers, but high enough to result in the protection of appropriate and proportionate amounts of land in the conservation or sending areas.

A fair transfer fee will vary according to several factors:

- Strength of the local real estate market: the more robust the market, the more “in demand” the credits will be and the higher their value.
- Type of development: the value of the credit will need to vary with the value of the development on which they are used. Considering that the fees will be used to buy the right to develop additional units, the fees must be proportionate to the expected market value of those units. For example, the fee per additional unit for a multifamily condominium development will ordinarily be lower than for an additional detached single family house.
- Change over time: the density fee will need to be adjusted over time to account for changes in prices of land and house.
- Degree of incentive: as a matter of local policy, the value or cost of a density credit can also vary by the degree of incentive the community wants to place on their use. If priced so high as to capture all of the value of the increased density (i.e. the full value of an additional building ‘right’) there may be no financial advantage to the developer and no use of the TDR. A community that wants to see active use of density transfers will price them to ensure they are profitable. Some trial and error is likely needed to find the right balance.

Because of these variables, it is highly recommended that a community planning to implement a density transfer ordinance undertake a real estate market analysis (REMA). A REMA will help calibrate the proper prices for density credits, gauge the market strength in the community and

estimate the average amount of conserved land that would be achievable per credit sold. This appraisal should be undertaken prior to the enactment of the ordinance and setting of the fees. In addition, communities are advised to include a provision in the ordinance or administrative regulations allowing the planning board to obtain an opinion of value appraisal as needed in the review of a density transfer proposal.

## 6. *Density Transfer Fund*

In order to hold and accumulate density transfer fees, communities must have in place a non-lapsing municipal fund established (or useable) for this purpose. The Conservation Fund, as enabled by RSA 36-A:5, is already established in many New Hampshire communities and can be used for this purpose to the extent that the density transfer fees are for the acquisition of conservation lands.

The Conservation Fund, by statute, is placed under the control of the Conservation Commission and may legally be used to carry out other obligations of the Commission in addition to land acquisition. In some towns this may create a concern that the transfer fees might not always be used as intended by the ordinance. To address this, it may be advisable to include language in the ordinance to require the Town Treasurer (who administers the account) to account for density transfer fees separately (essentially creating a Density Transfer Account within the Conservation Fund) and to stipulate that the fund be used only for land acquisition in the “sending” conservation areas. Alternatively, the community could seek to establish a wholly separate Density Transfer Fund once authorized. Legal opinions differ as to whether Towns are allowed to do this under existing statutes, or whether specific enabling law is needed. With either approach communities are strongly advised to seek the advice of their legal counsel and consent from the NH Department of Revenue Administration.

## 7. *Administrative Capacity*

The use of the density fee approach simplifies the administrative requirement of a density transfer ordinance in comparison to the conventional forms but it still carries some administrative burden. At a minimum, additional development checklist items are needed to determine eligibility, accounting procedures will need to be established to ensure that correct density credits are applied and fees are paid, that the added density right is recorded on the subdivision plan or site plan and that the process exists to periodically review and adjust the density transfer fee structure. Once established, however, these are little more burdensome than many common ordinances in wide use in New Hampshire.

The model ordinance assesses the density transfer fee at the time of the issuance of the building permit. The fee is averaged across all lots in the approved development, rather than being applied to only the lots or units added from the density credit. This has the advantage of reducing up-front costs for using density transfers to the developer (again, the purpose being to encourage their use), but this approach does place the responsibility on the municipality to ensure

that the fees are collected when the building permit is issued – even if the lots are sold to new owners prior to building. Thus it would be important to include appropriate notations on the subdivision plans that include density transfers.

The model ordinance also requires the Planning Board to periodically review and update the density transfer fee schedule. Further it would be advisable for Planning Boards to track the amount of land conserved using the density transfer fee to determine to what extent the amount of land conserved is balancing the additional housing units permitted by the density transfer.

## 8. *Market Conditions*

The pre-requisites and conditions discussed in this section to this point involve preparations that a community, at its discretion, can undertake and control. Market conditions are a different matter, yet equally important for successful implementation. Specifically, there must be sufficient demand for new housing development overall and adequate opportunity and demand for development of the type and in the areas where density credits can be used. For most New Hampshire communities, and especially in the southern tier, the demand condition is generally met. In recent decades New Hampshire has experienced greater growth pressures than the other New England states and this is likely to continue – especially if greater choice in housing types and prices are offered. In addition, it appears that the trend in community development here and elsewhere is toward traditional neighborhoods and village development as well as other forms of higher density development. This trend will create real opportunities for using density transfers.

To the extent that “market conditions” limit density transfer ordinances from taking hold here, it will be because, once established, they are shunned by developers as offering insufficient advantage to offset added time and complexity. Yet as the most easily developable land is depleted in New Hampshire, there will be more opportunity for infill and higher density development than of the conventional form.

### **Margin Note:**

#### **Steps for Enacting a Density Transfer Ordinance**

1. Update the Master Plan to incorporate: i) information and outreach supportive of the concept and public purpose for affecting density transfers, and ii) broadly identifying the area where densities should be lowered and raised.
2. Identify sending areas (conservation areas) where density transfer fees will be used to acquire conservation easements.
3. Identify receiving zones (where density increases of varying degrees are feasible and appropriate) and establish conditions under which higher densities will be allowed.
4. Conduct Real Estate Market Analysis to establish the value(s) of density credits.
5. Prepare Density Transfer Ordinance and educate the public.

6. Establish a Density Transfer Fund or the Town Conservation Fund (to hold density transfer fees until used to buy development rights) and related accounting procedures for tracking the use of the fees.

### **III. Legal Basis and Considerations for New Hampshire**

#### **A. *Legal Framework***

The legal framework for Density Transfer Ordinances is based on the convergence of three legal concepts: 1) the ability of government to regulate and limit the extent (including density) of development on a property for a valid public purpose (like protecting public water supply lands); 2) the common legal convention that property rights are made up of a “bundle” of different rights which are severable from one another (e.g., air rights; mineral rights; rights-of-way; water rights; and use rights); and 3) the ability to establish an exchange of such rights through a contractual arrangement (i.e., established in the zoning ordinance). The three come together in a TDR ordinance in that the government (the town or city) varies allowable development density in different areas of the community, allows a density right to be severed from sending property and added to receiving property, and finally regulates this transfer through a form of zoning contract established in its ordinance.

As a zoning ordinance, the authority to adopt a TDR system is derived from the power (delegated from the State) to regulate land use to protect public health, safety, and welfare. About half of the states in the nation, including New Hampshire, have specific statutes which enable density transfer ordinances in their planning enabling statutes, while in others the statutory basis falls back on general zoning.

#### **B. *Statutory Authority in New Hampshire***

New Hampshire’s innovative zoning statute (RSA 674:21(d), Innovative Land Use Controls), includes the “transfer of density and development rights” as one of the controls that is specifically enabled in state law. As with most of the listed techniques in the innovative land use statute, no specific definition, description or limitations are provided to define how the technique should be used. Standard requirements applicable to all of the innovative land use controls are established however: they must be supported by the master plan and must contain standards for their administration. The statute also specifically authorizes the granting of conditional or special use permits in approving proposals submitted under the statute.

Two important changes were made to the Innovative Zoning Statute in 2004, which may strengthen the implementation of density transfer ordinances. First, the word “density” was added to transfer of development rights, and second, the law was changed to stipulate that innovative land use controls, including density transfer ordinances, can be made mandatory.

The model ordinance presented in Section V is designed to use the conditional use process as specified in 674:21, II. It makes specific references to the community's Master Plan and assumes in particular that the Plan has identified the concept and rationale for transferring density between zones as well as the locations, either generally or by specific location, of the areas where density is to be added or reduced.

Finally, the Innovative Land Use Control Statutes (RSA 674:21-a) contain specific provisions to ensure that development restrictions agreed to as a condition of approval (including conservation easements, partial development restrictions or other limitations) are legally enforceable by municipalities and affected property owners.

### ***C. Density Transfers and the Takings Issue***

A recurring legal issue with TDR and DTC ordinances (as with many other planning regulations which impose limitation on the use of property) is the claim that they constitute a taking without just compensation. TDRs may be more vulnerable to this claim than other land use regulations in that they specifically involve the "taking" of development rights from one location even if the value is preserved for the owner. For the most part, where TDRs have been challenged, they have been upheld.

The model contained here is not likely to be vulnerable to any takings claim in that, as presented, it is voluntary. Land identified as conservation area is not restricted from development unless and until conservation easements on that land have been acquired through voluntary sale or other agreement. The property owner will enter into conservation restrictions by choice. However, in the case where a Town makes density transfers mandatory (which is permitted in 674:21, if supported in the Master Plan) an understanding of the applicable case law is advisable. For further reference, *Takings and Givings* (Pruetz 2003) contains a comprehensive review of federal and state court cases pertaining to TDRs. While density transfer ordinances have been upheld repeatedly in the courts, they have also been denied in a few instances, so care must be taken in how mandatory density transfer ordinances are enacted.<sup>5</sup>

There have been no density transfer cases in New Hampshire courts. There are however a number of takings cases which are reviewed in Loughlin (2006).

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<sup>5</sup> Two major cases involving density transfer have been heard before the U.S. Supreme Court: *Penn Central v. City of New York* (1978) and *Suitum v. Tahoe Regional Planning Agency* (1997). In the former, New York City denied Penn Central the right to build a 50 story building on top of grand Central Terminal, but allows in its "Landmarks" legislation the transfer of their vertical development rights to other lots in the surrounding area. The Court denied Penn Central's takings claim because: 1) the City's objective in preserving the historic character of the building was a permissible governmental goal, and 2) no taking had occurred. This was supported by the ability to transfer and use the development rights elsewhere.

In the Tahoe case, the landowner was denied the use of land for building in an environmentally sensitive area (a sending area in their TDR program) but was granted the right to build elsewhere. The owner did not wish to build elsewhere and sued the agency. The court remanded the case and it is not fully litigated; however, the court found that the value of a TDR does not determine whether a taking has occurred, rather it only addresses whether adequate compensation has occurred. This decision suggested that TDRs do not necessarily eliminate a takings claim but do provide a "built in" means to compensate for them.



#### **IV. Examples and Outcome Where Density Transfer Ordinances Have Been Applied**

Pruetz (2003) presents case studies of over 130 TDR and other density transfer programs that are in use around the country. They cover a wide range of program scopes, technique, and approaches. As was pointed out earlier, there are many more examples of TDR than there are *successful* examples. Many operate at a scale (commonly county or regional level) that has limited applicability in New Hampshire. The most applicable and useful examples for this Guidebook are municipal TDRs, and with some exceptions, ones from other New England States. Examples presented below, all municipal in scale, include two conventional TDR programs, two density transfer fee programs and the two existing examples from New Hampshire.

##### **A. *Conventional TDR Programs***

###### **1. *Falmouth, Massachusetts***

The Falmouth TDR ordinance was first enacted in 1985 and has been revised over time. Its purpose is to protect surface waters and groundwater recharge areas in an effort to protect the Town's public water supplies. It establishes donor (sending) areas defined primarily as areas important to surface and groundwater supplies; receiving districts are made of most residentially zoned districts not in the sending area. TDRs are granted through the subdivision process and include a "special permit" requirement somewhat analogous to the model's conditional use permit. The ordinance establishes a minimum parcel size for the area to be developed of 5 acres. The ratio for density transfers ranges from 1.2 to 1.4 (meaning for every acre conserved credits for 1.2 to 1.4 lots are transferred) depending on the receiving zone. Acceptance of the program has been slow. It has been used three to four times.

###### **2. *Jericho, Vermont***

The Town of Jericho adopted a transfer of development rights program in 1992. As required by Vermont TDR enabling law, the Town identified sending and receiving areas and established a "by right" fixed density increase of 100% in the receiving areas. It stipulates that the sending sites must be protected by conservation easement. The ordinance establishes a "transferable development unit" as equal to one residential unit or 1000 square feet of commercial office space. Applicants must submit a surveyed plan for the sending area showing the number of lots that could be derived, a step which may discourage its use. Receiving site proposals are reviewed under a conditional use permit process. Particular attention is paid to the documentation and filing of the TDR which permanently attaches the transferred rights to the receiving site. As of 2001 Jericho's TDR program had not yet been used (Pruetz 2003).

## ***B. Density Transfer Fee Programs***

### *1. Berthoud, Colorado*

The Town of Berthoud has been the pioneer in “reinventing” TDR into a more flexible, adaptable and less complex zoning tool. The concept Berthoud developed serves as the starting point for the model in this chapter. The approach came about through an unsuccessful attempt to adopt a conventional TDR in 1999. Unable to achieve consensus in the community in identifying the boundaries of sending and receiving areas, the Town adopted a density transfer fee in lieu of a traditional TDR. The fee applies to any residential development where additional density has been petitioned. The proceeds of the transfer fee are restricted to the preservation of agricultural land, open space, and environmentally sensitive areas. Like the model presented here, the fees are assessed at the building permit stage. Also similar is the option for the developer to provide the conservation easement directly instead of paying the transfer fee.

An aspect that gives one pause in the Berthoud example is the low values of the fees assessed per unit of added density. The Town charges \$3000 per single family house and half that for multifamily homes. However, these levels are based on the Town’s estimate of what it will cost to protect an acre of land in the unincorporated lands that make up the sending areas. The estimated cost is \$3700 per acre, yielding a transfer bonus of about 1.25 – well within the range of other TDR programs (Pruetz 2003).

### *2. Gorham, Maine*

The Town of Gorham may be the first community in New England to adopt Berthoud’s approach of a fee-based density transfer ordinance. Gorham’s ordinance was the starting point for the model developed for this guidebook. The Town adopted it in 2004, largely in support of its comprehensive (master) plan which calls for the concentration of development around two historical village centers in the Town.

The ordinance establishes a “Development Transfer Overlay District” which serves as the receiving area of the density transfer ordinance. Use of the ordinance is *optional*. Developers are granted the right to develop at higher densities within the overlay (“well planned higher density residential development in the designated areas”). Proposals submitted under the Overlay District must be served by the public sewer system and are subject to special review under performance standards contained in the ordinance – analogous to the conditional use permit process in the model. The calculation of the fee is somewhat complicated and derives a number of “bonus units” defined as the number of units in excess of what is approvable under the Town’s conventional zoning provisions. The fee per bonus unit is \$15,000. The proceeds of

this fee are used to buy land or development rights from rural land. Preservation priority is given to parcels adjacent to land already under Town ownership.

## ***B. New Hampshire Transfer Fee Programs***

### ***1. Lee, New Hampshire***

Lee was the first New Hampshire community to adopt a TDR ordinance. It is designed to preserve farmland, open space, forests, watershed and other significant natural resources as well as the Town's rural character. The ordinance is simple and short, but is also limited in scope in that sending sites and receiving sites must be contiguous. No sending or receiving zones are defined per se; any two contiguous sites in the town could potentially utilize the TDR provisions. The amount of density that can be transferred from a sending site is equal to the development units approvable under the Town's conventional zoning. The amount of development allowed on the receiving site through TDR is equal to the total development permitted on both sites combined. The Planning Board has the right to decide transfer applications on a case-by-case basis taking into consideration the specific natural characteristics and resource values of the two sites.

### ***2. Dover, New Hampshire***

The City of Dover has had its Transfer of Development Rights ordinance in place since 1990, however, until 2004 it was limited to non-residential development in the City's industrial and business development districts. The TDR functions primarily within the confines of two large industrial and business parks (I-4 and B-4), but has been used numerous times and is considered successful by the planning staff. Approximately 35 acres of conservation land has been preserved in these two parks since the program began. The TDR district is treated as an overlay zone; projects submitted are reviewed under special performance standards.

The TDR provisions were expanded in 2004 to include residential subdivisions, but to date these have not been successfully used. The planning staff is considering amendments to the TDR Ordinance to make its use more attractive.

## **V. Model Language, Illustrations, and Guidance for Implementation**

### **DENSITY TRANSFER ORDINANCE**

#### **PREAMBLE**

The Density Transfer Ordinance is enacted to facilitate the implementation of multiple goals of the Town of \_\_\_\_\_ Master Plan [date], including *[as appropriate: the protection of natural resources, preservation of open space, promoting compact and village forms of*

*development, and encouraging development in locations well served by municipal infrastructure*]. These goals are accomplished by allowing, under certain conditions, an increased increment of residential development density in designated residential zones in exchange for the permanent protection of land in designated conservation and resource protection areas, either through direct acquisition or through the payment of density transfer fees used for this purpose.

The zones in which increased densities are permitted are intended to be those where higher development densities are desired and consistent with future land use recommendations of the Master Plan. The areas where offsetting conservation land is to be acquired are intended to be those with high conservation and resource protection value as identified in local, regional and state conservation plans, and consistent with the future land use recommendations of the Master Plan.

**Margin Note:** As implied in both the Preamble and Authority and Purpose, it is important that the municipal master plan include policies supportive of density transfers. The master plan should clearly support the goal to have the areas of town that are recognized as most important for resource protection and open space preservation remain largely undeveloped, and identification of areas where higher development densities are appropriate and desired. Up to a point, the more specific the master plan is (especially in the future land use section) in identifying the specific location of this area, the more supportive it will be of a density transfer regulation.

## **I. AUTHORITY AND PURPOSE**

- A. The density Transfer Ordinance is enacted in accordance with RSA 674:2-5 and under the authority granted by RSA 674:16 (Grant of Power) with specific authority provided 674:21(I) (Innovative Zoning Land Use Controls) and 674:21(II) relative to conditional use permits. Density transfer, as established in this ordinance is a specific application of 674:21(I)(d), “Transfer of density and development rights.” Further, this ordinance is enacted to implement future land use recommendations of the Master Plan pertaining to the protection of important natural resources, the preservation of open space and the establishment of efficient and orderly and more compact development patterns in the community.
- B. The purpose and intent of the ordinance is further specified as follows:
  - 1. To protect important natural resources including agricultural lands, large forest blocks, water supply lands, and other undeveloped lands contributing to general ecological function.
  - 2. To foster a more sustainable pattern of growth by encouraging development within or near existing areas of development and infrastructure.

3. To promote the implementation of the [As appropriate: Town of \_\_\_\_\_ Open Space and Conservation Plan – or other similar reference].
4. To reduce sprawl and the rate of consumption of undeveloped land.
5. To establish a workable, equitable mechanism to shift development density from areas in the Town where future development is undesirable to areas where it is desirable.

## II. DEFINITIONS

**Margin Note:** Definitions specific to the density transfer ordinance are included here as a separate section but are best incorporated into the general definitions section of the Zoning Ordinance. Other terms may need to be defined.

Conservation Area: The area or areas defined in Section IV.B within which conservation land acquisitions will be made using density transfer fees.

Density Transfer Credit: The increase in density allowance afforded to a development, expressed in dwelling units or reduction in lot area, which is acquired through the payment of a density transfer fee or the donation of developable land in the Conservation Area.

Density Transfer Fee: The fee paid to the Town in exchange for an increase in permitted development density when developing within one of the defined Development Areas.

Density Transfer Increment: The differential between the maximum development density permitted under the standard provisions of the Zoning Ordinance and that permitted under the Density Transfer Ordinance.

Development Districts: The residential and mixed use districts within which density transfer credits can be used, as specified in Section IV.A.

## III. APPLICABILITY

- A. The use of the Density Transfer Ordinance by landowners is optional. Approval of a specific application is at the discretion of the Planning Board, granted through a Conditional Use Permit. If the density transfer option is not requested or not approved, the provisions of the underlying ordinance remain in effect.
- B. The provisions of the density transfer ordinance may be utilized for new residential subdivisions, in-fill development, *[including mixed use development if applicable under*

*existing zoning*] and residential development projects subject to site plan review, provided that:

1. The development is to be located within an eligible residential [*or mixed use*] development district as defined in Section IV.
2. The landowner or developer will pay a density transfer fee to the Town to be used to acquire conservation land or conservation deed restrictions or easements in areas designated for conservation in Section IV, or, at their discretion, the landowner or developer acquires such land or easements directly on behalf of and in the name of the Town. The amount of the transfer fee or acreage conserved shall be determined through the process described in Section V.
3. A conditional use permit is approved.

#### **IV. DESIGNATION OF DISTRICTS FOR DENSITY TRANSFERS**

##### **A. Development Districts**

Density transfer credits may be applied in the residential [*add where applicable: mixed use district and village or town center districts*] development districts specified below. Density transfer credits may not be applied in portions of these districts that are within a defined resource protection district or overlay zone including [*identify as applicable: conservation overlay district or wetland, shoreland, aquifer, floodplain overlay districts*].

[*Include here a list of the residential, mixed use, town center and others where density transfer credits are to be applicable: e.g.*

1. *Town Center District*
2. *Multi-Family Residential District*
3. *Residential District A*
4. *Residential District B*]

##### **B. Conservation Areas**

The utilization of density transfer credits in eligible development districts shall be off-set by the permanent protection of conservation land [*or permanent deed restriction to reduce development density*]. The land areas designated for conservation acquisition through density transfers shall be limited to those defined by the Town through the Master Plan and the following supporting sources:

*[Include here a map(s) or other references to applicable plans or studies indicating areas of high natural resources and conservation value. Sources might include resource co-occurrence mapping, the Town's Open Space/Conservation Plan if one exists, or other objective sources such as the Land Conservation Plan for Coastal Watershed, State Wildlife State Plan, I-93 Natural Services Network study, Regional Open Space/Conservation Plan, etc. Multiple sources can be used, but the net results should be a readily definable conservation area where the town will use density transfers fees and other sources to limit future development through acquisitions].*

## **V. DENSITY TRANSFER DETERMINATION**

### **A. Procedure**

1. Notification: A landowner or developer intending to utilize the density transfer option shall notify the Planning Board of this intent upon application for development review. The Planning Board shall determine eligibility of the proposed development to use density transfer in accordance with Section IV and review with the applicant the criteria for conditional use approval.
2. Conflicting Provisions: Where provisions of the Density Transfer Ordinance conflict with those of the underlying district, the provisions of this Ordinance shall apply, provided that the application is in compliance with the ordinance and any conditions required as part of the conditional use permit.
3. Plan Notation: Any subdivision or site plan submitted for approval under the Density Transfer Ordinance must include a plan notation to be filed with the plan at the Registry of Deeds stating that a density transfer fee will be required prior to the issuance of the building permit for each dwelling unit. The density fee shall be determined at the time of issuance based upon the fee schedule referenced in Section V.C.2.

### **B. Density Transfer Standards**

1. Increases in development density permitted under this ordinance shall only apply to development proposed in zoning districts identified in Section IV.A.
2. The allowable density increase that may be transferred to a residential development *[or to the residential portion of a mixed use development]*

within an eligible district is determined by the Planning Board as part of the Subdivision or Site Plan approval process.

3. No density increase shall be permitted above that which would cause lot size or configuration to fall below the minimum required to meet on site septic disposal, well radius, wetland or shoreline setbacks, or other applicable environmental standards.
4. The maximum density increase allowable under the density transfer ordinance shall be as specified in Schedule 1. The landowner may request a smaller density increase than allowed based on development design objectives; the Planning Board may approve a smaller density increase than requested, based on site characteristics, neighborhood context, or other considerations as outline in Section VI.

**Margin Note:** Setting density transfer rates (i.e. the level of ‘up-zoning’ allowed) in the development districts is a key component in successfully implementing a density transfer ordinance. If set too high, existing residents in these districts are likely to object. If set too low, the usefulness in generating density transfer fees or acreage, and thus in protecting conservation lands, will be too limited to be perceived as worthwhile. This model takes the approach of establishing a maximum transfer for each zone where they are allowed, but allowing for a case by case evaluation through the conditional use permit. This puts some burden on the Planning Board to make this judgment in each application but allows for flexibility. In areas without sewer and water, onsite requirements for septic, well radius and other setbacks will become the limiting factor for density transfers rather than the limits established here. Note that the ranges provided in the Sample Schedule 1 are included to illustrate the range of impacts, both to the change in lot size and the potential to generate transfer fees. When implementing the ordinance these ranges should be replaced with set maximums.

<b>SCHEDULE I</b> <b>Maximum Density Transfer</b> [FOR ILLUSTRATION ONLY];				
<i>(Lot size reduction ranges are shown for illustration purposes; in an actual ordinance a single maximum value should be used in each zone. The maximum transfer rate(s) may be reduced as a condition of the conditional use permit based on the evaluation of the specific proposal – See Section VI A. &amp; B.)</i>				
<b>Example Development Districts</b>	<b>Existing Minimum Lot Size</b>	<b>Maximum Density Transfer</b>	<b>Minimum Lot Size after Density</b>	<b>Density Transfer Credit</b>



		(Lot Size Reduction)	<b>Transfer</b>	(= additional lots)
<i>Town Center (with municipal water &amp; sewer)</i>	<i>10,000 s.f.</i>	<i>at 25%... at 50%...</i>	<i>7,500 s.f. 5,000 s.f.</i>	<i>0.33 1.0</i>
<i>Rural Village (with community water &amp; sewer)</i>	<i>20,000 s.f.</i>	<i>at 25%... at 50%...</i>	<i>15,000 s.f. 10,000 s.f.</i>	<i>0.33 1.0</i>
<i>'Suburban' Residential (with shared septic and/or community well)</i>	<i>43,560 s.f.</i>	<i>at 35%... at 75%...</i>	<i>28,300 s.f. 10,890 s.f.</i>	<i>0.54 3.0</i>
<i>'Suburban' Residential (w/o community water &amp; sewer)</i>	<i>43,560 s.f.</i>	<i>NONE</i>	<i>NA</i>	<i>NA</i>
<i>Rural Residential</i>	<i>87,120 s.f.</i>	<i>at 35%... at 60%...</i>	<i>56,628 s.f. 34,848 s.f.</i>	<i>0.54 1.5</i>

### C. Density Transfer Credits

The mechanism for implementing density transfers established under this ordinance is a density transfer credit. In order to utilize the higher development densities allowed in Schedule 1, the appropriate number of density transfer credits must be acquired by the payment of a density transfer fee or by the acquisition and protection of developable land.

1. Calculation: Density transfer credits shall be calculated based on the number of additional dwelling units in the subdivision or site plan that are in excess of the number that could be approved on the site without the use of the density transfer option. The number of units approvable without any density transfers shall be determined from a satisfactory yield plan supplied by the applicant.
2. Yield Plan: Dwelling unit density for the proposal based on underlying zoning requirements shall be determined using a yield plan provided by the applicant and reviewed and approved by the Planning Board. The yield plan, while not required to be a fully engineered plan, must contain sufficient detail of site conditions for the Board of accurately determine

the number of dwelling units that are reasonably approvable on the site based on conventional density, dimensional standards and environmental standards. The Planning Board may adopt regulations to specify the content and methods to be used in preparing the yield plan.

**Margin Note:** If the town already has an open space or cluster development ordinance it likely already has a requirement for a yield plan or similar method for determining the site's base development density. If so, that method may be referenced here. Note that non-engineered yield plans have not always proven to be satisfactory, however, requiring a fully engineered plan will deter the use of the density transfer option. Other methods exist, which use site level averaging of soil, slope and wetlands conditions together with standard deductions for roads, drainage facilities and setbacks. The town may wish to investigate these as alternatives to the yield plan.

3. Density Transfer Fee: The density transfer fee required to purchase density transfer credits shall be established on a per dwelling unit basis for the development project and assessed at the time of the issuance of the building permit for each dwelling unit. The fee schedule shall be established by the Planning Board, published in the Town Subdivision and Site Regulations and updated periodically to reflect changing market conditions. The objective of the fee structure shall be to generate sufficient funds to offset the additional dwelling units with the permanent protection of developable land within the designated conservation areas at the rate of [not less than *1 acre per single family dwelling and .5 acre per multifamily dwelling*].

**Margin Note:** Much like the density transfer rate itself, establishing the “right” density transfer fees is critical to the success of the ordinance. The objective is to find the right balance between a fee low enough to create adequate incentive for developers to use density transfers, and high enough to generate enough revenues to purchase the offsetting conservation land.

The model places the fee schedule in the Planning Board's regulations so that it can be more easily modified to adjust to find the right balance and to account for changing market conditions. A sample fee schedule is provided at the end of this model, however municipalities are strongly advised to engage in a market study using real estate appraisers or others familiar with land valuations in the community who have no financial interest in the outcome, and development project pro-formas before establishing a schedule.

4. Direct Land Conservation Option: As an alternative to the payment of the density transfer fee, the density transfer credits may be acquired through direct acquisition or permanent protection of conservation land within the Conservation Area defined in Section IV. B. Applicants using this option shall submit plans for the proposed acquisitions at the time of the application. The acquisitions shall be sufficient to offset the additional

dwelling units with the permanent protection of developable land at the rate of not less than [*1 acre per single family dwelling and .5 acre per multifamily dwelling*]. The transfer and recording of fee simple deeds or conservation easements at the Registry of Deeds shall be a condition for the issuance of building permits for dwelling units for the development.

## **VI. CONDITIONAL USE PERMIT**

Approval of a development proposal utilizing the density transfer option is subject to a Conditional Use Permit approved by the Planning Board (RSA 674:21(II)). This approval shall be based on compliance with the Standards of Approval set forth below. The Board shall issue a written report of finding and conditions which shall be filed with the Plan if approved.

### **A. Standards for Approval**

The following standard must be met or mitigated to the satisfaction of the Planning Board prior to granting the Conditional Use Permit. These standards should be reviewed within the scope of impacts caused specifically by the increase in density sought under the provisions of this ordinance.

1. Compatibility with Existing Residential Use: The proposed development is compatible with existing residential character and setting. This standard shall consider: neighborhood design and function; architectural compatibility, including roof type and pitch, style of units, building materials; screening and privacy and other factors as appropriate.
2. Neighborhood Design: Where appropriate to the density and style of development, the proposed development should include features to enhance walkability and features of good neighborhood design, such as sidewalks and curbing, pedestrian paths, bike paths, street lighting and public spaces.
3. Environmental Compliance: Increased density and smaller lot sizes of the proposed development will not result in non-compliance with any applicable State or Town environmental ordinances and regulation, including, but not limited to septic system siting, well radius, wetland or shoreline setbacks.
4. Traffic Impact: The higher density of the proposed development will not unreasonably impact nearby intersections and corridors, nor result in added future costs for the Town beyond that for a development of standard density.

5. Historic and Cultural Resources: Increased density will not result in the loss or impairment of historic buildings, settings or landscapes beyond that for a development of standard density.
6. Municipal Facilities and Services: Increased density of the proposed development will not exceed the capacity of required municipal services beyond that which will be mitigated as a normal condition of approval.
7. Conservation Land Acquisition: If the proposed development is to donate developable conservation land or easements to the Town in place of the payment of a density transfer fee (as provided for in Section V.C.4), the Planning Board shall request an evaluation from the Conservation Commission as to the appropriateness of the donation with regards to its location, conservation value and development potential.
8. General Considerations:
  - i. The proposed development is consistent with the Town Master Plan and the purpose and intent of the Density Transfer Ordinance;
  - ii. The increased density of development, when also considering the offsetting conservation of developable land, will not result in undue future expenses to the Town;
  - iii. The proposed development will not create a hazard to the general public health safety and welfare of the community.

B. Conditions

The Planning Board may impose additional conditions in its approval of the Conditional Use Permit as deemed necessary to accomplish the goals of the Density Transfer Ordinance, including but not limited to the reduction in the maximum density transfer set forth in Section V B, and in Schedule 1.

## VII. USE AND DISPOSITION OF DENSITY TRANSFER FEE

A. Establishment and Use of Density Transfer Fund

Density transfer fees collected pursuant to this Ordinance shall be deposited into a separate non-lapsing Density Transfer Fund account administered by the Town Treasurer (RSA 41:29). The account is established for the purpose of collecting, holding and disbursing funds for the acquisition of fee interest in, or conservations easements on, potentially developable land. Such acquisitions shall be made

within the Conservation Areas designated in Section IV.B above and for the purposed set forth in this Ordinance. The Fund may also be used to offset costs for property appraisals and the preparation of deed restriction and easements documents or other such costs directly related to the acquisition of such lands.

The Density Transfer Fund may be used in conjunction with other Town, State, Federal or private funds to acquire such land provided that the land will remain permanently undeveloped and is located within the Conservation Area.

**Margin Note:** An alternative to establishing a new fund specifically for the density transfer fee is to use the Conservation Commission's Conservation Fund enabled under RSA 36-A:5 and in place in many communities. Be aware, however, that under that enabling law, the Conservation Fund may be used for other duties of the Conservation Commission in addition to land acquisition. If the Conservation Fund is used, the density transfer fees placed in it should be accounted for separately to ensure that the purposes of the Ordinance are met.

#### B. Disposition of Protected Land

Any land acquired using density transfer fees shall be permanently restricted from development by deed restriction which shall run with the land. Such land shall be used only for conservation, agriculture, forest management, watershed management, wildlife management, open space, passive recreation and accessory uses necessary to support the principle uses. Acquisitions held by the Town may be used for additional recreational purposes as determined by the Town not involving the erection of permanent enclosed buildings.

Ownership of the land may be held by the Town under management of the Conservation Commission, or may be transferred, upon the approval of Town Meeting, to a recognized conservation organization or land trust on conditions that the land will remain permanently undeveloped and subject to the use restrictions as defined above, and that ownership will be returned to the Town upon dissolution of the organization.

**SAMPLE DENSITY TRANSFER FEE SCHEDULE**  
**[for inclusion in Subdivision and Site Plan Regulations]**

[FOR ILLUSTRATION ONLY -- DO NOT USE]

		<b><i>Fee per Additional Dwelling Unit</i></b> (See V. C. 1. - Density Transfer Credit Calculation)	
<b>Example Development Districts</b>	<b>Existing Minimum Lot Size</b>	<b>Single Family</b>	<b>Multi-Family</b>
<i>Town Center (with municipal water &amp; sewer)</i>	<i>10,000 s.f.</i>	<i>\$15,000</i>	<i>\$7,500</i>
<i>Rural Village (with community water &amp; sewer)</i>	<i>20,000 s.f.</i>	<i>\$15,000</i>	<i>\$7,500</i>
<i>‘Suburban’ Residential (with shared septic and/or community well)</i>	<i>43,560 s.f.</i>	<i>\$25,000</i>	<i>\$15,000</i>
<i>‘Suburban’ Residential (w/o community water &amp; sewer)</i>	<i>43,560 s.f.</i>	<i>NA</i>	<i>NA</i>
<i>Rural Residential</i>	<i>87,120 s.f.</i>	<i>\$20,000</i>	<i>\$12,500</i>

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